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Pursuant to National Labor Relations Board Rule 102.46, the California Nurses Association (“CNA” or “Union”) hereby takes exceptions to the findings and conclusions of Administrative Law Judge Mary M. Cracraft (“the ALJ”) as set forth in her Decision issued on November 16, 2015, as follows. The Union separately files its Brief in Support of Exceptions.

1. CNA excepts to the decision of the Administrative Law Judge (ALJ) to dismiss the complaint and implicitly defer to the decision of the Arbitrator John Kagel, contrary to the standards outlined in *Spielberg Mfg. Co.*, 112 NLRB 1080(1955) and *Olin Corp.*, 268 NLRB 573(1984). (ALJD 10) Such conclusion is contrary to Board law and documentary evidence introduced in prehearing briefs.
2. CNA excepts to the ALJ’s conclusion that “the basic disagreement [at arbitration] was whether the event announced on November 13, 2013, was a ‘layoff’ or a ‘restructuring.’” (ALJD 3:2-3) Such conclusion is contrary to documentary evidence introduced in prehearing briefs.
3. CNA excepts to the ALJ’s conclusion that Arbitrator Kagel made an “inherent” determination “regarding whether Charge Nurses performed bargaining unit work with respect to taking patient assignments prior to being eliminated.” (ALJD 6:2, n. 9) Such conclusion is contrary to documentary evidence introduced in prehearing briefs.
4. CNA excepts to the ALJ’s conclusion that “Looking at the issues from a factual basis, the arbitral issues and the statutory issues are factually parallel.” (ALJD 6:9-11) Such conclusion is contrary to Board law.
5. CNA excepts to the ALJ’s conclusion that “the arbitrator further fully considered the issue of transfer of bargaining unit work to supervisors and found that the Department Supervisors perform no bargaining unit work, thus in effect determining the contractual and

statutory issues of breach of contract.” (ALJD 6:29-31) Such conclusion is contrary to Board law and documentary evidence introduced in prehearing briefs.

6. CNA excepts to the ALJ’s conclusion that “[the arbitrator’s] findings resolve the unfair labor practice allegation that Respondent transferred unit work to non-unit, supervisory employees without bargaining.” (ALJD 7:1-2). Such conclusion is contrary to Board law.

7. CNA excepts to the ALJ’s implicit conclusion that “[t]o the extent that CNA argues that this case does not turn on contractual interpretation, I reject this argument.” (ALJD 7:12-13) Such conclusion is contrary to Board law and documentary evidence introduced in prehearing briefs.

8. CNA excepts to the ALJ’s implicit conclusion that “[t]he arbitrator specifically considered the parties’ contract in making his finding.” (ALJD 7:13-14). Such conclusion is contrary to Board law and documentary evidence introduced in prehearing briefs.

9. CNA excepts to the ALJ’s implicit conclusion that “*Olin* does require that the issues be factually parallel.” (ALJD 7:26) Such conclusion is contrary to Board law.

10. CNA excepts to the ALJ’s implicit conclusion that “the statutory issues revolve, in part, and were determined in whole by analysis of the contract management rights clause.” (ALJD 7:32-33) Such conclusion is contrary to Board law and documentary evidence introduced in prehearing briefs.

11. CNA excepts to the ALJ’s implicit conclusion that “the contractual and statutory issues are factually parallel.” (ALJD 7:34-35) Such conclusion is contrary to Board law and documentary evidence introduced in prehearing briefs.

12. CNA excepts to the ALJ’s implicit conclusion that “the evidence presented to the arbitrator is generally the same evidence necessary for determination of the unfair labor practice

issues.” (ALJD 8:5-6) Such conclusion is contrary to documentary evidence introduced in prehearing briefs.

13. CNA excepts to the ALJ’s implicit conclusion that “[t]o the extent that CNA argues that the arbitrator did not consider comparative duties of Department Supervisors and Charge Nurses, I reject that argument as the evidence before the arbitrator included the job duties and testimony regarding those job duties.” (ALJD 8:6, n. 12) Such conclusion is contrary to documentary evidence introduced in prehearing briefs.

14. CNA excepts to the ALJ’s conclusion that “the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice allegations.” (ALJD 8:22-24) Such conclusion is contrary Board law and to documentary evidence introduced in prehearing briefs.

15. CNA excepts to the ALJ’s finding that “the arbitrator found there was no transfer of Charge Nurse duties to Department Supervisors.” (ALJD 9:12-13). Such conclusion is contrary to Board law and documentary evidence introduced in prehearing briefs.

16. CNA excepts to the ALJ’s implicit conclusion that “because the arbitrator found there was no transfer of Charge Nurse duties to Department Supervisors, the presence of this [management rights] provision [requiring bargaining before utilization of non-unit employees for bargaining unit work] in the parties’ contract would not be applicable to the arbitrator’s decision had it been called to his attention.” (ALJD 9:12-15) Such conclusion is contrary Board law.

17. CNA excepts to the ALJ’s conclusion that “it is unnecessary to reach the General Counsel’s further argument regarding the arbitrator’s failure to consider the unfair labor practice issues of decisional bargaining, notice, and waiver.” (ALJD 9:22-:24) Such conclusion is contrary Board law.

18. CNA excepts to the ALJ's implicit conclusion that "CNA misperceives the arbitrator's holding" as repugnant to the Act because "[the arbitrator] specifically stated that the scope of the unit was not compromised by the fact that a position set forth in the unit was not filled." (ALJD 9:28-30) The ALJ's conclusion misstates the Union's position and Arbitrator Kagel's decision. To the extent that the ALJ contends that the arbitrator's award is not repugnant to the Act, that conclusion is contrary to Board law.

19. CNA excepts to the ALJ's implicit conclusion that "it appears that there might have been conflicting evidence regarding the nature of the duties performed by Department Supervisors and whether any of their duties constituted Charge Nurse duties. The arbitrator was free to credit some of the testimony over that of others. Accordingly, I cannot find that this alone would require a finding that the arbitration award is not susceptible of an interpretation consistent with the Act." (ALJD 9:47-10:5) Such conclusion is contrary Board law.

20. CNA excepts to the ALJ's implicit conclusion that the arbitrator's decision was not repugnant to the Act and was susceptible to an interpretation consistent with to the Act. (ALJD 9:47-10:5) Such conclusion is contrary Board law.

21. CNA excepts to the ALJ's failure to find that the contractual and statutory issues are not factually parallel. In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs.

22. CNA excepts to the ALJ's failure to find that the arbitrator was not presented generally with the facts relevant to resolving the unfair labor practice. In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs.

23. CNA excepts to the ALJ's failure to find that the arbitrator's decision was palpably wrong and repugnant to the Act. In support of this exception, the Union relies upon Board law

and documentary evidence introduced in prehearing briefs.

24. CNA excepts to the ALJ's failure to find that Respondent violated the Act by transferring work formerly performed by Unit employees who held the position of charge nurse to the non-bargaining unit position of department supervisor in its nursing department without affording the Union an opportunity to bargain with Respondent with respect to this conduct. In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs.

25. CNA excepts to the ALJ's failure to find that Respondent violated the Act by failing to continue in effect all the terms and conditions of the Agreement between the parties by transferring work formerly performed by Unit employees who held the position of charge nurse to the non-bargaining unit position of department supervisor in its nursing department. In support of this exception, the Union relies upon Board law and documentary evidence introduced in prehearing briefs.


26. CNA excepts to the ALJ's failure to consider whether deferral is inappropriate because the conduct at issue interferes with Section 7 rights or there is a serious economic impact on the many bargaining unit employees.

27. CNA excepts to the ALJ's failure to adopt a new framework in Section 8(a)(5) post-arbitral deferral cases similar to the post-arbitral deferral standard in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014) and require that the party urging deferral to demonstrate that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the arbitral

award. If the party urging deferral makes this showing, only then should deferral be appropriate, unless the award is clearly repugnant to the Act.

DATED: December 14, 2015

Respectfully submitted,


Carmen Comsti
Counsel for Charging Party CNA

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 2000 Franklin Street, Oakland, California 94612.

On the date below, I served a true copy of the following document:

**EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE MARY M. CRACRAFT'S
NOVEMBER 16, 2015, DECISION, FILED BY CALIFORNIA NURSES
ASSOCIATION'S**

**BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE
MARY M. CRACRAFT'S NOVEMBER 16, 2015, DECISION, FILED BY
CALIFORNIA NURSES ASSOCIATION'S**

Case 31-CA-117462

via Electronic Mail as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: December 14, 2015


Carmen Comati